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In the District Court of the United States for the Eastern District of Washington, Northern Division

EQUITY 4389

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, NORTHERN PACIFIC RAILROAD COMPANY, AS REORGANIZED IN 1875, NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION, BANKERS TRUST COMPANY, A CORPORATION, GUARANTY TRUST COMPANY, A CORPORATION, CITY BANK FARMERS TRUST COMPANY, A CORPORATION, DEFENDANTS.

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States submits herewith its statement showing the basis of jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

I. The statute conferring appellate jurisdiction upon the Supreme Court is the Act of May 22, 1936, c. 444, 49 Stat. 1369, which provides as follows:

186463—39——1

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E–4389, instituted and pending in the District Court of the United States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment authorized by said Act of June 25, 1929, shall continue in force and effect.

Approved, May 22, 1936.

II. The statute of the United States involved is the Act of June 25, 1929, c. 41, 46 Stat. 41, 43 U. S. C. secs. 921–929, which is verbatim as follows:

> An Act to alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the North-

ern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of the said land grants, and are hereby retained by the United States as part and parcel of the Government reservations wherein they are situate, relieved and freed from all claims, if any exist, which the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants: *Provided,* That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

SEC. 2. That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway

Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States.

SEC. 3. The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby; and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto.

SEC. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by

the Northern Pacific Railway Company in the operation of said road.

SEC. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, of said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mort-

gages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

SEC. 6. All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts In fixing the amount, if any, the said companies are entitled to receive on account of the retention by the United States of indemnity lands within national forests and other Government reservations, as by this enactment provided, the court shall determine the full value of the interest which may be rightfully claimed by said companies, or either of them, in said lands under the terms of said grants, and shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies, or either of them, or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against

said companies in the judgments and decrees of said court. To carry out this enactment the court may render such judgments and decrees as law and equity may require.

SEC. 7. The suit, or suits, herein authorized shall be brought in a district court of the United States for some district within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington or Oregon, and may be consolidated with any other actions now pending between the same parties in the same court involving the subject matter, and any such court shall in any such suit have jurisdiction to hear and determine all matters and things submitted to it in pursuance of the provisions of this Act, and in any such suit brought by the Attorney General hereunder any persons having an interest in or lien upon any lands included in the lands claimed by the United States, or by said companies, or any interest in the proceeds or avails thereof may be made parties. On filing the complaint in such cause, writs of subpoena may be issued by the court against any parties defendant, which writs shall run into any districts and shall be served, as any other like process, by the respective marshals of such districts. The judgment, or judgments, which may be rendered in said district court shall be subject to review on appeal by the United States circuit court of appeals for the circuit which includes the district in which the suit is brought, and the judgment, or judgments, of such United States circuit court of appeals

shall be reviewable by the Supreme Court of the United States, as in other cases. Any case begun in accordance with this Act shall be expedited in every way, and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for.

SEC. 8. It shall be the duty of the Attorney General to report to the Congress of the United States any final determinations rendered in such suit or proceedings, and the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture shall thereafter submit to Congress recommendations for the enactment of such legislation, if any, as may be deemed by them to be desirable in the interests of the United States in connection with the execution of said decree or otherwise.

SEC. 9. That the Secretary of the Interior is hereby directed to withold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental

thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined: *Provided*, That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto.

Approved, June 25, 1929.

III. The decree entered upon a review of the Master's report referred to in the Act of May 22, 1939, c. 444, 49 Stat. 1369, was entered on the 27th day of June, 1939. The order of January 29, 1936, amending the order of October 3, 1935, was entered on that date.

The application for appeal was filed and presented the 21st day of August, 1939.

IV. The suit was filed by the Attorney General on July 31, 1930, pursuant to authority and direction of the Act of June 25, 1929. c. 41, 46 Stat. 41, against the Northern Pacific Railroad Company, its successor the Northern Pacific Railway Company, and others. This Act was passed after a lengthy investigation of the administration of the Act of July 2, 1864, c. CCXVIX, 13 Stat. 365, and Joint Resolution of May 31, 1870, No. 67, 16 Stat. 378, making land grants to the Northern Pacific Railroad Company. The investigation was made by a joint committee of Congress pursuant to Joint Resolution of June 5, 1924, c. 267, 43 Stat. 461,

which followed the rendition of the decision in the case of *United States* v. *Northern Pacific Railway Company*, 256 U. S. 51.

The complaint contains appropriate allegations seeking to quiet title in the United States to approximately 2,900,000 acres of land withdrawn for various purposes, chiefly for National Forests, in what were claimed to be indemnity limits of the grants. The complaint also charges the defendant Railroad and Railway Companies with certain violations of the terms and conditions of the contract arising out of their acceptance of the terms of the granting acts and with fraud in the performance of the provisions of such acts, and alleges numerous errors in the administration of the acts. The prayer is that title to the withdrawn lands be quieted in the United States, that the court make the accounting provided for by the Act of June 25, 1929, and that the United States recover compensation on account of lands erroneously patented.

By the order of October 3, 1935, amended January 29, 1936, the court approved and adopted a Special Master's report holding some of the subdivisions of the bill insufficient in point of law upon the face thereof, and sustaining pleas of equitable estoppel, acquiescence and waiver as to certain subdivisions. The court's order was that such portions of the complaint be dismissed therefrom. The remaining issues in the suit, involving principally questions as to the measure of the grants, as to the amount of lands received there-

under and the extent of the unsatisfied losses of the railroad, the question of the validity or invalidity of the withdrawal of lands in the indemnity limits of the grants, and the availability of such lands for indemnity selection, were then referred to the Master by the Order of April 21, 1936, which is mentioned in the Special Appeal statute. This order reserved for later hearing, however, questions of the amount of compensation which might be payable to either party.

The Master on July 26, 1937, filed a report containing his recommended findings and conclusions. After hearing on exceptions to this report, the court sustained some of the exceptions, and denied others, and completed its review of the Master's report by making its findings and conclusions, and adopting some of the Master's findings, so that, by the decree appealed from, the Railway Company is adjudged entitled to select and have compensation on account of 1,453,061.02 acres of withdrawn lands in Wisconsin, Minnesota, Montana, Wyoming, Idaho and Washington and to have patent to 428,986.68 acres of lands outside such withdrawals.

By its contentions made at the hearing before the Master, its exceptions to the Master's report, its requests for findings, and its objections to proposed findings of the court, the plaintiff sought rulings, based both on fact and law, that the withdrawals in question were valid, both in whole and in part, that certain breaches of contract terminated the Railway Company's rights to select additional indem-

nity lands, that certain areas of the withdrawn lands, could not, under the terms of the grants, be claimed in satisfaction of the existing unsatisfied losses, and that, in any event, the Railway Company was not entitled to any compensation. The rejection of these contentions constitutes the basis of the assignments of error relating to the decree of June 27, 1939, and the action of the court in dismissing portions of the complaint and in sustaining the special defenses pleaded forms the basis of the assignments as to the Order of October 3, 1935, as amended January 29, 1936.

V. The cases believed to sustain the jurisdiction are *United States* v. *Bitty*, 208 U. S. 393, 399–400, and *Chippewa Indians of Minnesota* v. *United States*, 307 U. S. 1.

VI. No opinion was delivered upon the rendering of the decree of June 27, 1939. An opinion was filed September 9, 1935, preliminary to the making of the order of October 3, 1935, and copy thereof is appended hereto.

Dated August 21, 1939.

ROBERT H. JACKSON,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. E–4389

UNITED STATES OF AMERICA, PLAINTIFF

v.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, ET AL., DEFENDANTS

Homer Cummings, Attorney General, Harry W. Blair, Assistant Attorney General, E. E. Danly, Special Assistant to the Attorney General, J. Crawford Biggs, Special Assistant to the Attorney General, J. M. Simpson, United States Attorney, Counsel for United States of America.

D. F. Lyons, D. R. Frost, Grafton Mason, F. J. McKevitt, Counsel for Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

Taylor, Blanc, Capron and Marsh, F. J. McKevitt, Mansfield Terry, Edward C. Watts, Jr., Henry R. Labouisse, Counsel for City Bank Farmers Trust Company.

White and Case, F. J. McKevitt, J. Du Pratt White, G. L. Vaught, Jr., Alfred N. Hueston, Counsel for Bankers Trust Company.

MEMORANDUM

Plaintiff's bill in equity in this case was filed pursuant to the provisions of the Act of June 25, 1929 (46 Stat. 41). Upon the filing of the defendants' answers the defendants moved that there be taken up in advance of trial under Equity Rule XXIX certain defenses pleaded in the answers. This rule provides that "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the Court." The motion was granted and on February 25, 1932, Frank H. Graves, Esquire, was appointed special master in chancery and these defenses were referred to him for consideration and report. After taking testimony pertinent to the defenses referred to him the special master fixed May 10, 1932, as the time for oral argument. Counsel for both sides of the controversy appeared at the time appointed and the arguments covered the period from May 10, 1932, to May 25, 1932. The report of the special master was filed on May 31, 1933. Thereafter exceptions to the report were duly filed by the parties, respectively, the plaintiff filing twenty-five exceptions and the defendants filing fourteen. These exceptions challenge practically all of the conclusions and recommendations of the special master. Thereafter the Court fixed January 9, 1934, as the time for hearing argument on the exceptions and these arguments covered, without interruption, the

period from January 9, 1934, to and including January 24, 1934. At the conclusion of the oral arguments time was allowed for the filing of briefs and in due course voluminous, exhaustive, and extraordinarily able briefs were filed. The case is now under submission on the exceptions to the report of the special master.

Equity Rule 61½, promulgated May 31, 1932, provides in part that "the report of the master shall be treated as presumptively correct, but shall be subject to review by the Court, and the Court may adopt the same, or may modify or reject the same in whole or in part, when the Court in the exercise of its judgment is fully satisfied that error has been committed."

After careful and painstaking consideration and study of the oral arguments and elaborate briefs and an examination of the controlling authorities, and after repeated and critical perusals of the special master's report, I am not only not "fully satisfied" that error has been committed by the special master, but on the contrary I am "fully satisfied" that his conclusions are sound and correct. His report is painstaking, exhaustive, and masterful, and the more I have examined and analyzed it in the light of the vigorous criticisms of it, made in oral arguments and written brief, the more I am convinced that his views and conclusions are sound and are amply sustained in reason, principle, and authority.

Whilst in some instances additional reasons might be advanced in support of the conclusions reached, and in others different reasons may suggest themselves, in every instance I find myself in complete accord with the result arrived at. If the learned special master and I were sharing a joint and equal responsibility as members of a court in deciding the questions involved, and he had submitted his report in the form of a proposed opinion, I should not hesitate fully to concur in it. In such circumstances it would serve no useful purpose, but would be a labor of supererogation on my part to undertake any extensive elaboration of the master's report.

On the important question of the proper application of the equitable maxim or doctrine of "He who comes into equity must come with clean hands," I wish to call attention to the case of *Manufacturers Finance Company* v. *McKey, Trustee in Bankruptcy,* 294 U. S. 442, decided by the Supreme Court on March 4, 1935, and long after the special master had filed his report. It seems to me that this case lends strong support to the views of the special master as to the application of the "clean hands" doctrine to the facts of the case in hand.

With respect to Subdivision XXXVIII of the bill, alleging the fraudulent classification of lands under the Mineral Classification Act of February 26, 1895 (28 Stat. 683), I feel a word should be added. In view of the tentative and qualified con-

clusions of the special master on this aspect of the case (see special master's report, page 146) I attempted during the course of the oral arguments before the Court to have counsel for the government define a trifle more specifically the purpose of these allegations and just what place they were intended to occupy or what office they were intended to perform in the theory of the government's case. The result was that counsel for the government (Mr. McGowan) by repeated and definite oral statement asserted that no money judgment was sought by the government in the way of damages for the alleged fraudulent classification, nor did the government ask any reclassification of the lands; that the sole purpose of the allegations in this regard was to give rise to the application of the "clean hands" doctrine. No motion for leave to amend the bill in accordance with the special master's suggestion has been made. The sole point, therefore, in this aspect of the case is whether these allegations are sufficient to call for the application of the "clean hands" maxim. Since I fully concur in the special master's opinion that the allegations do not give rise to the "clean hands" doctrine, the demurrer or motion directed to the portion of the bill now under consideration should be sustained and this matter should be stricken from the bill.

I feel that a few brief observations are in order concerning Subdivision XXIX of the bill relating to the Fort Laramie Treaty of September 17, 1851, and the Blackfoot Treaty of October 17, 1855—

this because of the recent decisions of the Court of Claims in the Fort Berthold case, decided December 1, 1930, and the Blackfoot case decided April 10, 1933, and the kindred cases decided by that court dealing with the same or similar questions. None of these cases either held or intimated that the lands covered by the treaties in question were reserved lands within the meaning of Section 3 of the Act of July 2, 1864. Under the broad jurisdictional acts, pursuant to which these cases were instituted, it was not necessary to recovery by the Indians that the land be held to constitute a technical reservation under the treaties and we must not be misled by the broad language employed in the opinions of the court. These treaties may well give rise to substantial recovery by the Indians without at all implying that the lands assigned to the various tribes under the provisions of the treaties were removed from the operation of the original land grant to the railway company.

To illustrate how ridiculous it would be to hold that these treaties exempted the lands covered by them from the grant to the railway company let us note briefly the situation as to the Crow Territory alone. Under the Fort Laramie Treaty the acreage in the Crow Territory was 37,500,000 acres and there were approximately 3,000 Crow Indians in 1851. This means that 12,500 acres, or more than eighteen square miles, were "reserved" for each man, woman, and child in the Crow tribe. If there had been a reservation of these lands so that they did

not pass under the grant of 1864, the railway company would have been compelled to build more than 700 miles of railroad without the aid of the grant except to the limited and comparatively inconsequential extent that it might be able to secure indemnity. Since the purpose of the Act of 1864 was to aid and encourage the construction of a transcontinental railroad from Lake Superior to Puget Sound it would hardly do to hold that Congress in that very act so contrived as to make the construction of such a railroad impossible. It requires no argument to demonstrate that if these lands had been reserved the road could not have been constructed. I am convinced that it was never the thought or purpose of the Congress that the lands involved in these treaties were to be excepted from the grant to the railway company, no matter what effect that may have had in conferring some rights upon the tribes involved.

My conclusion is that all exceptions filed, both by plaintiff and defendants, be overruled and that the report of the special master in its entirety be adopted. Order accordingly will be entered in due course.

U. S. GOVERNMENT PRINTING OFFICE: 1939